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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL EVERETT JANES,

Defendant and Appellant.

F075623

(Super. Ct. No. CRM033025A)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Jeanne Schechter, Commissioner.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

At the conclusion of a jury trial on December 29, 2016, Michael Everett Janes was convicted of discharging a firearm from a motor vehicle at another person (Pen. Code,¹ § 26100, subd. (c); count 1), assault with a firearm (§ 245, subd. (a)(2); count 2), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3). The jury found true firearm enhancements alleged in count 1 (§§ 12022.53, subds. (b), (c), & (d)) and count 2 (§§ 12022.5 & 12022.55). Janes admitted a prior strike conviction within the meaning of the three strikes law. (§§ 667, subds. (b)-(i), 1170.12, subds. (b)-(g).)

On April 10, 2017, the court sentenced Janes to the upper prison term of seven years on count 1 for violating section 26100, subdivision (c), doubled to 14 years pursuant to the three strikes law. The court imposed a sentence of one third the midterm on count 3, or eight months, doubled to one year four months to be served consecutively to count 1. The sentence on count 2 was stayed pursuant to section 654. Janes's sentence for firearm enhancements on count 2 were also stayed. The court imposed a sentence of 25 years to life on count one for personally using a gun and causing great bodily injury (§ 12022.53, subd. (d)).

The trial court granted Janes's in limine motion to prevent witnesses from referring to the fact that Janes was on parole when he was arrested. During his testimony, however, an investigator referred to the fact Janes was on parole when he was arrested. The court denied defense counsel's motion for a mistrial. On appeal, Janes contends the trial court erred in denying his motion for a mistrial. The prosecutor incorrectly stated that the parties had stipulated as to count three that Janes possessed a firearm the evening of the shooting. Janes further contends his trial counsel was ineffective for failing to object to a misstatement by the prosecutor concerning a stipulation by the parties. Janes contends recent amendments to sections 12022.5 and 12022.53 give the trial court

¹ Further statutory references are to the Penal Code unless otherwise indicated.

discretion to strike firearm enhancements and the case should be remanded for the court to consider whether to exercise its discretion.

We reject Janes's contentions that the trial court erred in denying his motion for mistrial and the prosecutor's misstatement of the stipulation was reversible error. Because we remain uncertain as to how the court would have exercised its discretion to strike or to impose the gun use enhancement, we remand for a new sentencing hearing.

FACTS

On April 19, 2014, Oliver V. attended a party of about 10 people, including Janes, who were eating, drinking, and socializing at Antonia James's home. Janes got into a fight with James's son, Victor Torres, that Oliver V. broke up. Janes borrowed a phone to call for a ride home. Oliver V. saw Janes walk out the front door and walk across the street. Oliver V. resumed a conversation in the front of the home with his back to the street and then saw a car driving up to him and passing directly in front of him. He saw someone who looked like Janes in the back seat of a silver Honda Accord. Oliver V. heard someone say "[t]here goes Michael." Oliver V. thought the person in the back seat looked like Janes because of his tattoos.

When Oliver V. heard someone say "They're coming back," he immediately dropped to the ground because that "means one thing to me. They're coming back, you know." Oliver V. heard gunshots and his arm felt like something hit it. He ran back into the house. In the house, Oliver V. noticed he had a bullet wound that went through his arm and into his chest. He was flown to a hospital in Modesto but was released later that evening. The bullet was later removed and the wound healed.

There were bullet holes in Oliver V.'s truck. Oliver V. did not think Janes was drunk that evening. Oliver V. identified Janes from a photo lineup.

Antonia James was at her home with her son, Victor, and her daughter, Bennie Torres, as well as other friends, including Janes. James had known Janes since he was in sixth grade. Victor and Janes got into a fight in the kitchen that evening. James, who had

been taking a shower, thought Oliver V. broke up the fight. Janes made a telephone call. James talked to Janes's mother on the phone. Janes, who had been drinking, left the residence. James heard someone talking about a gun but could not identify who it was. James was in the front yard of her house when she saw Janes in the back seat of a silver Honda driving past her house.

The silver Honda made a U-turn and came back. James told her son and other guests to get the children inside the house. She saw a driver, "possibly" a passenger in the front passenger seat, and Janes in the back seat of the silver Honda. When the car made a U-turn and passed again, James noticed that Janes had switched sides in the back seat and James could see him hanging slightly out of the car window. James yelled to everyone to run and get inside the house when she heard several gun shots. The car sped away.

Bennie Torres testified that her brother Victor Torres and Janes had been friends since childhood. Janes started swearing at Bennie during a conversation, Victor jumped in, and the two men started fighting. Bennie did not remember Oliver V. breaking up the fight but said her mother told Janes to leave. Bennie continued cooking and 20 minutes later heard gunshots.

Felicia Villa was at the party and described Janes as getting out of control. Bennie told him to settle down. Janes got loud with Bennie who then slapped him. Victor got into it with Janes. Several people told them to stop fighting because children were present, so Janes sat down on a couch. The fight only lasted two or three minutes with a couple of blows thrown. Antonia James came out and told Janes to call his mother. After calling his mother, Janes put on his jacket and walked out the front door.

A little while later Villa recognized Janes driving by and staring at everyone angrily. She also recognized him by his distinctive tattoos. Janes was a passenger sitting next to the driver in a gold four door car. Villa ran inside the house and checked who Janes had called and could tell he called his mother. Villa went back to the garage and

saw the car pull up to the driveway. The driveway was obstructed with a car and pickup truck but the silver Honda's headlights were pointed down the driveway. She saw a gun pulled out and heard shots fired. It sounded like fireworks and there was a lot of smoke. Villa saw Janes holding the gun with his head sticking out of the car window. Two other witnesses heard shots but did not see who fired them.

Several Merced Police officers were dispatched to the James residence. Officer James Marshall arrived to a chaotic scene with 10 to 15 people, many of them children. Marshall talked to Antonia James who said a couple of times that the suspect was Michael Janes. James identified Janes as sitting in the back seat of the silver Honda as it drove by. Soon thereafter, James identified Janes as the shooter during an in-field show-up.

Officer William Avery took photographs of bullet holes found on a pickup truck and a different Honda sedan in the driveway of the James home. He also collected bullet fragments that pierced the back end of both vehicles. Avery found a .9 mm PMC head-stamped shell casing in the street. Bullet fragments were recovered from the driver's seat of the Honda in the driveway and its front dashboard. A second shell casing stamped "Luger" was also found in the street.

Officer John Pinnegar found a silver Honda Accord on Lopes Avenue. The car matched the description of the car involved in the shooting. When Pinnegar looked through an open window into the front seat of the car, he saw shell casings on the seat and obtained a search warrant. After the car was towed into the police evidence yard, Pinnegar searched it and found four spent 9 mm Luger shell casings in the back seat. Officer Joseph Deliman contacted Oliver V., learned the bullet was still in his body, and informed Oliver V. to contact the police if the bullet was extracted from him. Deliman later learned Oliver V. had the bullet, retrieved it from him, and photographed it. Gunshot residue was detected on Janes and two others associated with him. Gunshot residue was specifically found on Janes's right hand.

Sarah Yoshida is a senior criminalist with the Central Valley Department of Justice laboratory and examines firearms and bullets. Yoshida explained that cartridges are ejected from an automatic weapon. In non-automatic weapons, the cartridge remains in the chamber. Markings on the casing and markings on a bullet can be compared to determine if they were fired from the same weapon. The barrels of guns have rifling which she described as “lands and grooves.” If a barrel has six grooves around its diameter, a bullet fired through that barrel will also have six grooves.

Yoshida examined evidence in this case, including two jackets, or bullets, and five cartridge cases. She concluded that all five of the cartridges had been fired from the same weapon. Based on the rifling pattern on one bullet jacket, Yoshida determined it was a .38 caliber bullet, and it was fired by a .38 automatic or a 9 mm. Luger. This second bullet had a different rifling pattern and was fired from a different weapon. Yoshida explained that a third bullet, which had just been received and examined during the trial, had a rifling pattern similar to the first bullet, and was also different than the pattern on the second one. She could not rule out that the first bullet and the newly tested bullet were fired from the same gun. Because Yoshida did not have both bullets in the lab at the same time, she could not say so for certain.

A stipulation was read to the jury stating that Janes had previously been convicted of a felony in regard to the allegation in count 3 that he was a person prohibited from possessing a firearm in violation of section 29800, subdivision (a)(1). The parties also stipulated to the foundation and findings of a Department of Justice report concerning gunshot residue.

MOTION FOR MISTRIAL

Introduction

Before trial, the court ordered the prosecutor to inform his witnesses not to refer to Janes’s gang affiliations. The court also ordered the prosecutor to admonish the arresting officer not to mention that Janes was on parole. Officer Brian Rinder was one of the

officers dispatched to investigate the shooting. Rinder testified that as he monitored the radio, he “remembered three weeks prior going to Mr. Janes’s mother’s residence in an attempt to arrest him on a parole warrant.”

The court excused the jury to hear defense counsel’s motion for a mistrial. Counsel argued that reference to Janes being on parole was prejudicial and his position had been harmed. The prosecutor represented that he thought all of the testifying officers were present when he admonished them not to mention Janes’s parole status. Rinder told the court he was not present during that meeting. The court found that its order to not mention Janes’s parole status had been violated but ruled that any prejudice could be cured with an admonition to the jury. The court noted the jury would figure out Janes was a convicted felon because of the allegation in count 3 that he was a felon in possession of a firearm.

The court instructed the jury: “you may have heard Officer Rinder make a statement during his testimony regarding the defendant’s parole status. I am instructing you to disregard that statement, that testimony. You’re not to consider it for any purpose, and you are not to draw any adverse influences [*sic*] against Mr. Janes from such testimony.” Janes contends the trial court abused its discretion in denying the motion for mistrial resulting in a denial of his Fourteenth Amendment right to a fair trial and due process of law.

Analysis

Exposing a jury to the defendant’s prior criminality “presents the possibility of prejudicing a defendant’s case and rendering suspect the outcome of the trial.” (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580 (*Harris*).) Whether erroneously admitted evidence warrants a mistrial or the error can be cured by striking the challenged testimony and admonishing the jury rests within the trial court’s sound discretion. (*Id.* at p. 1581.) The trial court should grant a mistrial when it is apprised of prejudice it judges as incurable by admonition or instruction. What makes a particular incident incurably

prejudicial is, by its nature, a speculative matter. The trial court is vested with considerable discretion in ruling on mistrial motions. (*Ibid.*, citing *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Even if a trial court abused its discretion in denying a motion for mistrial, the error is harmless where the evidence of the defendant's guilt is overwhelming and subject to little or no dispute at trial. (See *Harris, supra*, 22 Cal.App.4th at p. 1581.)

Janes argues that no weapon was recovered and no forensic evidence linked him to the vehicle thought to be used in the shooting. He further argues that forensic evidence indicated two different guns were used in the shooting and witnesses were not sure how many people were in the car. Janes acknowledges, however, that witnesses saw him in the car and he was found, along with two other suspects, to have gunpowder residue on his hands. Also, Antonia James saw Janes in the backseat of the silver Honda, hanging out of the car and shooting. Investigators found 9 mm shell casings in the backseat of the vehicle.

After reviewing the evidence in the light most favorable to the prosecution, we determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.) Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient to support a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181 (*Young*).) An appellate court must accept logical inferences that the jury might have drawn from circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396 (*Maury*).) We must therefore view the evidence in the light most favorable to the jury's verdict. There was substantial evidence that Janes fired multiple gun shots from a vehicle.

The trial court instructed the jury to disregard the parole testimony, admonishing the jury not to consider the testimony for any purpose or to draw any negative inferences against Janes. We find the trial court's evidentiary order and admonition sufficient to

cure any potential prejudice. It is only in the exceptional case that improper subject matter is of such character that its effect cannot be removed by the court's instructions. Furthermore, because the jury was aware of Janes's status as a felon, mention of the fact that he was on parole did not substantially prejudice him or affect his due process rights. (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1429; *People v. Bolden* (2002) 29 Cal.4th 515, 555 [brief reference by witness of defendant's parole office insignificant, trial court did not abuse its discretion in denying mistrial motion, and there was no denial of due process].) We reject this contention.

PROSECUTOR'S MISSTATEMENT DURING CLOSING ARGUMENT

During closing argument, the prosecutor erroneously told the jury the parties had stipulated Janes was a convicted felon and that he possessed the firearm the evening of the shooting. Janes did not stipulate to possessing the firearm, only to having a felony conviction. Janes contends his counsel was ineffective for failing to object to the prosecutor's argument. We find no prejudice and therefore reject this contention.

The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 391, 394; *In re Hardy* (2007) 41 Cal.4th 977, 1018 (*Hardy*).) A reasonable probability is one sufficient to undermine confidence in the outcome. The second question is not one of outcome determination but whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. (*Hardy, supra*, 41 Cal.4th at pp. 1018-1019.)

A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not

deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Maury, supra*, 30 Cal.4th at p. 389.) Attorneys are not expected to engage in tactics or to file motions that are futile. (*Id.* at p. 390; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 165-166.)

Even assuming that defense counsel's performance was below professional norms in failing to object to the prosecutor's statement, Janes cannot demonstrate prejudice because of the thorough instructions the trial court gave the jury on how to evaluate the remarks of counsel and the court's restatement of the stipulation by the parties. Just before closing arguments and right before the prosecutor misspoke, the court advised the jury: "Please remember what attorneys say is not evidence." Later, the court instructed the jury: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

The court later added: "Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence. Nothing the attorneys say is evidence. In their opening statements and closing arguments the attorneys discuss the case, but their remarks are not evidence." In its instruction on count 3, the court only referred to the stipulation that Janes was a felon advising the jury: "The Defendant and the People have stipulated or agreed that the Defendant was previously convicted of a felony."

Jurors are presumed to understand and follow the court's instructions. (*Young, supra*, 34 Cal.4th at p. 1214; *People v. Coffman and Marlow* (2005) 34 Cal.4th 1, 83; *People v. Ewing* (2016) 244 Cal.App.4th 359, 383.) The court carefully defined the

stipulation made by the parties during trial and in its instructions setting forth the elements of count 3. The primary issue raised by Janes's counsel during closing argument concerned the number of people in the car and the possibility that another occupant of the car, Andrew Ybarra, had significant traces of residue on both hands, raising the issue of another person being the shooter rather than Janes. No reasonable juror would have understood the stipulation by the parties to have included the fact that Janes also possessed the gun. Janes has not demonstrated the second prong of ineffective assistance of counsel – prejudice. We do not find ineffective assistance of counsel.

SENATE BILL NO. 620

The parties filed supplemental briefing addressing the effect of Senate Bill No. 620 on Janes's sentence. On October 11, 2017, the Governor approved Senate Bill No. 620, effective January 1, 2018, which amended sections 12022.5 and 12022.53 to give the trial court discretion to strike or dismiss a firearm enhancement. Previously, the trial court had no discretion to strike or dismiss such enhancements and they had to be imposed by law. The parties agree this statutory amendment is retroactive to all cases not yet final because its effect mitigates punishment for a particular criminal offense. (See *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1132-1133 (*Rodriguez*); *People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Vieira* (2005) 35 Cal.4th 264, 306; *People v. Francis* (1969) 71 Cal.2d 66, 75–76; *People v. Diaz* (2018) 21 Cal.App.5th 538, 546.) The People argue, however, the trial court would not change its ruling on whether to strike the firearm enhancement or change Janes's sentence. We find the trial court's statements at sentencing more ambiguous than do the People and therefore remand the matter for a new sentencing hearing.

In sentencing Janes, the trial court noted the crime did not make sense given the relationships Janes had with the victims. The court observed the victims still care about Janes. The court stated Janes had a very violent history and its objective was the protection of society. The court found it was a miracle no one else was shot and that

Janes's conduct was reckless and dangerous because the house was full of people, including children. The court stated Janes was a danger to society. The court stated that it was sentencing Janes to the upper term of seven years on count 1, doubled pursuant to the three strikes law. The court imposed a consecutive midterm sentence on count 3 which it also doubled pursuant to the three strikes law. Janes's total determinate sentence was 15 years, four months. Without further comment, the court imposed an indeterminate sentence of 25 years to life for the section 12022.53, subdivision (c) enhancement.

Although the court talked about the recklessness of Janes's conduct and the danger he posed to the community, it also noted Janes had support from the victims despite his actions. From the court's comments at sentencing, we cannot say with certainty it would necessarily have imposed the enhancement had it foreseen a change in the law granting it discretion not to do so. (See *People v. Lua* (2017) 10 Cal.App.5th 1004, 1021.) The court did not have discretion at the sentencing hearing on April 10, 2017, and did not expressly state that even if it had discretion it would still impose the gun use enhancement.

This case is also distinguishable from *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, where the trial court clearly stated it did not find any good cause to strike a prior conviction allegation and had many reasons not to, concluding the defendant was the kind of person the law intended to keep off the street as long as possible. The trial court's comments here fell short of the observations by the trial court in *Gutierrez*. Under these circumstances, it is uncertain whether the trial court would exercise its discretion to strike the gun use enhancement, and remand is warranted. We reject the People's argument the record clearly establishes that the trial court would not exercise its

discretion to strike any firearm enhancement and a remand for resentencing would serve no purpose.²

DISPOSITION

Janes's sentence is vacated and the case is remanded for the trial court to conduct a new sentencing hearing in order to exercise its discretion to strike or to impose the Penal Code section 12022.53, subdivision (d) gun use enhancement pursuant to Senate Bill No. 620. Janes's convictions are affirmed.

SNAUFFER, J.

WE CONCUR:

FRANSON, Acting P.J.

SMITH, J.

² Although not briefed by the parties, we note that depending on the sentence selected by the trial court, Janes, who was 23 years old when he offended, may be entitled to a hearing to determine suitability for parole based on his youth at the time of the offense. (§§ 3051 & 4801; see *Rodriguez, supra*, 4 Cal.5th 1123, 1130-1133; *People v. Franklin* (2016) 63 Cal.4th 261.)